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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1946

No. 52

ARCH R. EVERSON,

Appellant,

—vs.—

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, IN THE COUNTY OF MERCER, *et al.*,

Appellees.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

BRIEF ON BEHALF OF APPELLEES

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Appellees.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

BRIEF ON BEHALF OF APPELLEES

Introductory Statement

The sole question for decision is this:

> **Does the Federal Constitution debar a State from using its own funds to transport children to and from all non-profit schools (private as well as public) which those children attend in obedience to the compulsory education laws of the State?**

The constitutional principles involved are well established. The application of those principles in this case, and the decision to be rendered by this Court, have a direct bearing on the present legislation and public policy of at least 16 States, and will intimately affect millions of citizens for generations to come.

New Jersey, like every other State in the Union, recognizes education as the cornerstone of free government.

This does not mean that education is the concern solely of the State. It is the inalienable natural right, and the inescapable natural duty, of parents to see that their children are educated for life through agencies of their own choosing.

So far as that duty is concerned, it is recognized and enforced by a New Jersey statute which requires the parents of every child of school age to cause that child to be educated, and which punishes them as disorderly persons if they fail to do so (N. J. S. A. 18: 14-14 and 14-18).

So far as that right is concerned, it is recognized and protected by the Constitution of the United States. In *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925), this Court unanimously declared:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

By specific statute enacted long before that decision, New Jersey recognized that it was the right of the parents to select the agencies which should educate their children. The same statute which places upon parents the responsibility for the education of their children provides that that responsibility may be discharged either (i) by attendance at a public school, or (ii) by attendance at "a day school in which there is given instruction equivalent to that provided in the public schools", or (iii) by "equivalent instruction elsewhere than at school"—*i.e.* instruction by a

private tutor or by the parents themselves (N. J. S. A. 18: 14-14). Whenever the requirements of that statute are met, whatever may be the type of instruction selected by the parents, the public purpose of the compulsory education laws has been served and a public benefit has accrued to the State.

If children are to be educated, they must first get to school. (The exceptional case of the private tutor may be passed over for present purposes.) The old days of the one-room school house, reached on foot, over highways devoid of motor traffic, by children residing in the immediate neighborhood, are now long past in New Jersey, as in most other sections of the country. Centralization, with the educational advantages and the traffic hazards it involves, is now the rule.

To meet the new situation arising out of both the advantages and the resultant hazards of the automobile, New Jersey, like many other States, has provided transportation facilities at public expense for children attending the schools of their parents' choice in obedience to the compulsory education laws of the State. The New Jersey statute provides (N. J. S. A. 18:14-8):

> "Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.
>
> "When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established

school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part." Ch. 191, P. L. 1941, amending R. S. 18: 14-8.

Ewing Township, whose Board of Education is an appellee here, is a rural area adjacent to the City of Trenton. It has a public grade school, but no high school of any kind (R. 19). Children attending private schools of elementary grade, and all children attending high schools, whether private or public, must go elsewhere.

In accordance with the statutory authority, the Board of Education of Ewing Township adopted a resolution providing for transportation of those children at public expense (R. 13). Under the practice adopted by the Board, all children traveled on the regular public buses to their various destinations, and paid the regular fare (either 20¢ or 22¢ per day, depending on whether a transfer was required (R. 21)). Public school pupils were transported to the public high schools in Trenton and Pennington, and parochial school pupils were transported to parochial schools in Trenton. Of the 21 pupils whose cases are here involved, and whose parents are among the appellees, five attended parochial schools in the elementary grades, and 16 attended parochial high schools (R. 46). At regular intervals, on certificates issued by the respective public and parochial school principals showing the number of days' attendance by each child, his parents were reimbursed by the Board of Education. For the period involved here, those reimbursements amounted to $8,034.95, of which $357.74 went to the parents of parochial-school pupils, and the balance to parents of public-school pupils (R. 46). No part of the funds went to any school, public or private. Those reimbursements, so far as the parents of parochial-school

children are concerned, and the statute which authorized them, are now claimed by the appellant, a taxpayer of the township, to be obnoxious under the Fourteenth Amendment (a) because they involve the taking of private property for a private purpose and (b) because they amount to an establishment of religion.

Appellant's claims do not involve the State of New Jersey alone. They have a direct bearing upon the present and future legislative policies of every State in the Union. As shown later in this brief, the problem of transporting school children (and this means *all* children attending schools in compliance with compulsory education laws, not merely those who happen to go to the public schools) has been engaging the earnest attention of legislative bodies throughout the country. The various States have handled the problem in various ways. Some of them thus far have provided transportation for public-school children only. A rapidly increasing number, amounting at present to at least 16 States and the District of Columbia, provide in one way or another for transportation of children to and from both public and private schools. In some cases private-school children are carried free on the public-school buses. In others, separate buses are provided for each school, whenever the traffic warrants. In others, as in the case at bar, both groups of children are transported at public expense by common carrier. In others, carriers are required to provide reduced fares for all school children, public and private alike. In one case (New York), where the State Constitution had been construed by a 4 to 3 decision of the Court of Appeals to prohibit the use of public funds for transporting private school pupils, the voters promptly amended the Constitution to remove the difficulty. In another (Wisconsin), the voters will pass on a similar proposed amendment this year.

All of this legislation, existing and prospective, the appellant now asks this Court to strike down forever. Appellant is now asking this Court, under color of the Fourteenth Amendment, not merely to invalidate a statute adopted by the Legislature of New Jersey and sustained by its highest court, but to invalidate similar statutes of at least 15 other States, to rivet the fetters of unconstitutionality upon every attempt to deal with the situation, and to declare that no State may ever lawfully provide for the transportation at public expense of any child to any school but a public one.

Nor is this all. If, as appellant claims, no State may lawfully provide free transportation for children attending non-public schools, by what right may a State provide free school-books for such children? Six States are now doing so; and their right to levy taxes and expend public funds for that purpose was specifically upheld under the Fourteenth Amendment in *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370 (1930)—a decision which we submit is conclusive in the case at bar.

On appellant's theory, moreover, the validity of a whole series of Acts of Congress is necessarily drawn in question. Can the street railway and bus lines of the District of Columbia lawfully be required (Title 44, Sec. 44-214, Dist. of Col. Code, 1940) to transport children to and from both public and private schools at reduced fares? Can Federal funds be used, as Congress has provided (Act of June 4, 1946, c. 281, 60 Stat——, 42 U. S. C. §§1751-1760), to furnish government subsidized lunches to both private and public school pupils throughout the nation, and lunch-room equipment to the schools themselves? Can Congress lawfully make grants to denominational schools and colleges for the support and tuition of veterans under the G. I. Bill of Rights (Act of August 8, 1946, c. 886, Public Law 679, 79th Cong., 2d Sess.)?

We say that there is nothing in the Federal Constitution to prevent either Congress or the States from dealing with such problems in accordance with public policy and local need. Upon sound reasoning and decided authority alike, appellant's claims are without merit; and the judgment below should be affirmed.

Summary of Argument

I. If the States may provide textbooks at public expense for all children attending both public and private schools, as this Court unanimously decided in *Cochran* v. *Board of Education*, 281 U. S. 370 (1930), *a fortiori* they may provide transportation for those children.

II. The New Jersey statute does not deprive appellant of his property without due process of law. It is for a public purpose. It is a valid exercise of the police power, as an aid to education, as facilitating compliance with the compulsory education laws of the State, and as promoting the health, safety and welfare of school-children. It is not unconstitutional by reason of any incidental benefits to private individuals.

III. That statute does not amount to legislation respecting an establishment of religion.

IV. A decision holding the New Jersey statute unconstitutional would strike down similar legislation in at least 15 other States, would cast doubt upon the validity of several Acts of Congress, and would forever disable all of the States from legislating with respect to the transportation of children other than those attending public schools.

I

The judgment below should be affirmed on the authority of *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370 (1930).

By Acts No. 100 and No. 143 of 1928 the Legislature of Louisiana provided for the furnishing of school books at public expense "to the school children of the State". The Acts were intended to benefit all school children, public and private alike, and were so interpreted and administered by the local authorities.

In *Borden* v. *Louisiana State Board of Education*, 168 La. 1005, 123 So. 655 (1929), the Supreme Court of Louisiana sustained those acts under both the State and Federal Constitutions. A companion case (*Cochran* v. *Board of Education*, 168 La. 1030, 123 So. 664) was decided the same day on the authority of the *Borden* case.

The *Cochran* case was thereupon appealed to this Court, where the Louisiana legislation was attacked by the appellants under the Fourteenth Amendment upon the ground that the furnishing of textbooks at public expense to children attending private schools was a taking of the taxpayers' property for private use, in violation of the Fourteenth Amendment. The arguments advanced by appellants in that case were substantially the same as those advanced by appellant here. Indeed, the very issue of transportation was specifically urged in the following words, by two of the same counsel who now argue that issue for the appellant in the case at bar:

> "If the furnishing of text-books free to children attending private schools is not considered an aid to such private schools, but as incidental to the state educational system, then it logically follows that the

> tuition of the children attending such schools could be paid; *their transportation to and from such schools could be provided*; * * *." (P. 23 of appellants' brief in this Court in *Cochran* v. *Board of Education*, No. 468, October Term 1929; italics ours.)

This Court, in a unanimous opinion delivered by Chief Justice Hughes, sustained the constitutionality of the Louisiana statutes and affirmed the judgment below. After quoting from the portion of the opinion below describing the operation and effect of the legislation, and pointing out that the sole beneficiaries of the legislation were the school children and the State, rather than the schools themselves, this Court said (281 U. S. 370, 375):

> "Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the State is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded." *

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* This case has since been cited with approval and its principles followed in *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 518 (1937), where this Court, in upholding the Alabama Unemployment Compensation Act, stated:

> "The end being legitimate, the means is for the legislature to choose. When public evils ensue from individual misfortunes or needs, the legislature may strike at the evil at its source. If the purpose is legitimate because public, it will not be defeated because the execution of it involves payments to individuals. *Kelly* v. *Pittsburgh*, *supra* (104 U. S. 78); *Knights* v. *Jackson*, 260 U. S. 12, 15; *cf. Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 239-240. 'Individual interests are aided only as the common interest is safeguarded.' See *Cochran* v. *Board of Education*, 281 U. S. 370, 375; *cf. Clark* v. *Nash*, 198 U. S. 361, 367; *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598, 608; *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110."

That decision is on all fours with the case at bar. Furnishing free textbooks to a pupil attending a denominational school is certainly more obnoxious, on appellant's theory, than giving that pupil a free bus ticket to enable him to reach the same school. The parallel between free textbooks and free transportation was in fact pointed out not only in the brief of the unsuccessful party in the *Cochran* case but also in the opinions* of State courts which have rejected free transportation statutes under local constitutional provisions prohibiting appropriations in aid of denominational schools.

Since the decision of this Court in the *Cochran* case, and presumably in reliance thereon, five other States have enacted free textbook laws applicable to public and private school pupils alike:

Kansas—General Statutes, 1945 Supplement, Sec. 72-4107A.

Mississippi—Ch. 18 L. 1940, (now incorporated in Sec. 6656, Mississippi Code, 1942-44 Supplement) sustained as

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* In the footnote on page 13 of his brief, appellant states that the question of free textbooks was "apparently treated as a different question" from that of free transportation in various State cases involving the transportation issue. Of the four cases which he cites, three in fact appear to treat textbooks and transportation as exactly parallel. *State ex rel Traub* v. *Brown*, 36 Del. 181, 172 Atl. 835, 837 (1934); *Mitchell* v. *Consolidated School District*, 17 Wash. (2d) 61, 135 P. (2d) 79, 82 (1943); *Sherrad* v. *Jefferson County Board of Education*, 294 Ky. 469, 171 S. W. (2d) 963, 966 (1942). The fourth case which he cites (*Gurney* v. *Ferguson*, 190 Okla. 254, 122 P. (2d) 1002 (1941), does not discuss the textbook question specifically. *Judd* v. *Board of Education*, 278 N. Y. 200, 213-214, 15 N. E. (2d) 576, 583 (1938), not cited by appellant, treated the issues of textbooks and transportation as exactly analogous. All of the foregoing cases (discussed *infra*, pp. 42-48) turned on the language of the particular State Constitutions involved.

constitutional in *Chance* v. *Mississippi State Textbook Rating and Purchasing Board*, 190 Miss. 453, 200 So. 706 (1941).

New Mexico—L. 1933, Ch. 112, Sec. 5 (Sec. 55-1703, New Mexico Statutes Annotated).

Oregon—L. 1941, Ch. 485, Sec. 1 (Sec. 111-2015, Oregon Compiled Laws Annotated, 1943 Supplement).

West Virginia—Section 1782 (2) (21B), West Virginia Code of 1943.

Appellant, in endeavoring to distinguish the *Cochran* case from the instant one, says (p. 12 of his brief):

> "The lower court had held:
>
> "1. That the school books furnished to the children were not sectarian books for use in religious schools but were in fact the public school books adopted and used in the public schools.
>
> "2. That the books were merely loaned to the pupils and were not given to them."

This is a distinction without a difference. In the first place, the transportation furnished to the children is not sectarian transportation. It has no use whatever in the private schools, but is in fact the same transportation used by the pupils of the public schools. Secondly, the transportation is also merely furnished to the children for their use in going to and returning from school. In the one case the children are furnished the use of the books without charge to them; in the other they are furnished the use of the bus without charge to them. If the use was

not a gift in the one case it certainly was not a gift in the other.

But, says appellant (p. 13):

> "The analogy to furnishing public school text books to public libraries established and under control of the State and open to all the people with the right of any one to borrow the books for such length of time as the regulations permit—is inescapable."

Some other reflections are at least as inescapable. One is the statement in the *Cochran* opinion itself (281 U. S. 370, 375):

> "The Court [i.e. the Supreme Court of Louisiana] also stated, *although the point is not of importance in relation to the Federal question,* that it was 'only the *use* of the books that is granted to the children, or, in other words, the books are lent to them' ". (Italics ours.)

A second one is that if there must be an analogy, it would seem that the distribution of free textbooks for use in and by private schools is far more similar to payment by the State of tuition fees to those schools, than is the payment to parents, of transportation expenses, to which transactions the private schools are in no way a party.

A third is that the *transportation* is entirely under the control of the State. It may grant or withhold it at its pleasure and withdraw it whenever it seems desirable to do so.

A fourth is that under the New Jersey statute the transportation (like the textbooks in Louisiana) *was* made available under a proper classification to all alike regardless of

their religious creeds, in which case even appellant admits (p. 13) "there can be no doubt of the power of the State under the Fourteenth or the First Amendment to do so."

In the court below appellant attempted to distinguish *Cochran* v. *Board of Education* on grounds wholly different from those which he now advances; but as the grounds which he advanced below found some expression in the dissenting opinion in the New Jersey Court of Errors and Appeals, they deserve brief consideration.

His first argument was to the effect that the Louisiana textbook statute was for the benefit of all children, while the New Jersey transportation statute excludes children attending private schools operated for profit. *That distinction, which appellant has now abandoned, was the sole point on which he argued the Federal question below.** The argument is wholly unsound.

The parochial schools of Trenton, here involved, were not operated for profit, but in fact were operated at a loss (R. 23). Not a penny of the bus money went to those schools, since reimbursement was solely to the parents (R. 14-15). The record is silent as to the existence in New Jersey of any profit-making school for children of compulsory-school age; and no complaint has been made from any such source. In any event, the distinction made by the New Jersey Legislature between schools which

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* The only mention of the Fourteenth Amendment in appellant's brief in the New Jersey Court of Errors and Appeals was this (p. 77):

> "The use of public funds for the transportation of children to a 'school other than a public school, except such school as is operated for profit in whole or in part,' constitutes a taking of private property for private use and violates the Fourteenth Amendment. The statute does not provide for transportation of all school children of the state, but segregates non-public schools not operated for profit as its beneficiaries. *Cochran* v. *Louisiana State Bd. of Education*, 281 U. S. 370, 74 L. Ed. 913; *Citizens' Sav. & L. Asso.* v. *Topeka*, 20 Wall. 655, 22 L. Ed. 455."

are operated for profit and those which are not is entirely reasonable.*

Moreover, it is the unquestioned rule in this Court that before anyone may be heard to attack State legislation as unconstitutional, he must bring himself within the class affected by the allegedly invalid feature. *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134, 149 (1919). See also *Supervisors* v. *Stanley*, 105 U. S. 305, 311 (1881); *Citizens National Bank* v. *Kentucky*, 217 U. S. 443, 453 (1910). One who is not injured by the operation of a law cannot be deprived by it of either constitutional right or property. *Cusack Co.* v. *City of Chicago*, 242 U. S. 526, 530 (1917).

The record qualifies appellant Everson as a taxpayer (R. 12), and that is all. There is no showing, and no claim, that he is the proprietor of a private school operated for profit, or that he is the parent of any child attending such a school. Even if we assume that the statute unlawfully discriminates against those schools, he has no standing to complain.

In the Court below, appellant also attacked the validity of the *resolution* adopted by the Ewing Township Board of Education on the ground that the resolution, if not the statute, was discriminatory. His argument on that score, although not urged in his brief here, is reflected in the dissenting opinion below (R. 51), and has been resurrected in the briefs of *amici curiae* on his behalf.

The text of the resolution (R. 8) is as follows:

> "The Transportation Commit. recommended the Transportation of Pupils of Ewing to the Trenton High

* Massachusetts, Missouri, and Rhode Island, all of which have school-bus legislation similar to that of New Jersey, have made the same exception with respect to schools operated for profit (Appendix A, *infra*, pp. 67, 68, 71).

and Pennington High and Trenton Catholic Schools, by way of public carriers as in recent years. On Motion of Mr. R. Ryan, seconded by Mr. French, the same was adopted."

Appellant's argument in substance was that although the statute extends its benefits to all school children (except those attending schools operated for profit), the resolution makes an unauthorized discrimination by providing transportation only to those attending the public schools and the Catholic schools. On the same line of reasoning, appellant attempted below to distinguish this case from the *Cochran* case on the ground that while the Louisiana textbook legislation did not segregate private schools or their pupils, the present resolution does make such a segregation.

The answer to this argument is simple and realistic. It is a fair inference from the phrasing of the resolution that the Board of Education of Ewing Township is not composed of expert legal draftsmen, and that the members of the Board had no idea, when they passed the resolution, that they were laying the foundation of a constitutional case in this Court. They were dealing with the facts presented to them and not with legal theories. The only children with whom they were concerned were those living in their district, all of whom, so far as the record shows, attended either the public schools or the Catholic schools. The parents of such children were the only ones who applied for reimbursement. If there had been any other children who desired to attend a school of any other denomination or a school with no denominational affiliation whatever, the Board would have been required by State law to give them equal treatment, and would have done so. As there were none such, the Board discharged its duty

by passing a resolution adapted to reality. Here again, under the authorities cited *supra,* page 14, Mr. Everson has no standing to complain of the hypothetical discrimination, since there is no showing, and no claim, that he was injured by it. In any event, any theoretical deficiency in the draftsmanship of the resolution cannot serve as a basis for invalidating the underlying statute.

In attempting to distinguish this case from *Cochran* v. *Board of Education,* appellant has involved himself in a maze of inconsistencies.

In the court below, he asserted in one breath that the Legislature had no right to transport any child to any private school, and that it was an unconstitutional waste of public funds to do so; and in the next breath he asserted that the Legislature did not go far enough in wasting the public funds, because it excluded from its bounty those children whose parents were opulent enough to send them to private schools operated for profit. In the court below, he said on the one hand that the State had no right to help pupils to attend any denominational school, and on the other hand that the Ewing Township Board was guilty of discrimination by not helping non-existent pupils to attend still more denominational schools. His counsel, when speaking for their then client in the *Cochran* case, roundly asserted that free textbooks and free transportation were exactly alike and were equally bad. The same counsel, when speaking for their present client in the case at bar, now assert that the two are entirely different (a) because the textbooks were merely loaned, while the bus tickets are used up after each ride, and (b) because the textbooks (available on equal terms to all schoolchildren of the State) were not sectarian books, while the buses (likewise available on equal terms to all schoolchildren of the State) are apparently sectarian buses. Counsel admit, as they must in

view of the *Cochran* case, that the State may use the taxpayers' money to furnish free textbooks to a pupil once he reaches a private school, but assert that it may not use a penny of that money to help him get there.

In a more frank approach than that of appellant himself, the Civil Liberties Union recognizes the futility of any effort to reconcile that position with the principles of the *Cochran* case, and in its brief as *amicus curiae* (p. 34) flatly asks this Court to overrule the *Cochran* case in order to invalidate the New Jersey statute.

If there is any distinction between the *Cochran* case and the case at bar, the distinction is in our favor. The furnishing of free textbooks, while it undoubtedly aids the pupil in his education, can hardly be said to promote his physical safety. The furnishing of free transportation does both, by making it easier for him to attend school, and by removing him from the hazards of walking on the highway. The physical safety factor alone has been held sufficient in several cases to justify legislation of the type here involved (*infra*, p. 25); and the decision in the *Cochran* case, where that factor was wholly absent, is *a fortiori* an authority in our favor here.

Cochran v. *Board of Education*—cited with approval in *Carmichael* v. *Southern Coal Co.*, *supra*—is direct and conclusive authority for the constitutionality of the statute here involved; and on the authority of that decision, the judgment below should be affirmed.

II

The New Jersey Statute does not deprive appellant of property without due process of law.

A. The Expenditure is for a Public Purpose.

The narrow issue is simply whether any portion of State tax funds used to reimburse parents for transporting their children to and from all non-profit schools can be said to be spent for other than a public purpose. This case is in the nature of an injunctive proceeding, brought by a taxpayer who claims that public moneys are being spent for a private use. He has no other ground for complaint. If, as we contend, the proposed use is primarily public in nature, then any discriminations not affecting him are immaterial, and any incidental benefits to private interests are not relevant to the question of constitutionality.

Of course, public funds must be spent for a public use, and any deviation from this rule may be a violation of the due process clause of the Fourteenth Amendment. However, before a court proceeds to consider, on the merits, the question whether any given expenditure is for a public use, it should first give due heed to the rule, frequently stated by this Court, that the determination is in the first instance a function of the legislature.

The intent of this Court to give the States free rein to determine those measures which best promote the general welfare of their people is sweepingly stated in *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 514 (1937):

> "This Court has long and consistently recognized that the public purposes of a state, for which it may raise funds by taxation, embrace expenditures for its general

> welfare * * * . * * * whether the present expenditure serves a public purpose is a practical question addressed to the law-making department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court * * * ."

Legislative action is, of course, not conclusive where legal rights are involved; but the legislature's determination is entitled to great respect and should not be lightly overturned. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112 (1896). Here, the New Jersey Legislature has made a considered determination and has duly enacted the results after proper investigation. The highest court of New Jersey has upheld the Legislature's action. Appellant has the burden of proof on his claim that there has been a clear abuse of discretion. There is nothing in the record to show that he has sustained that burden.

In so far as the determination is secondarily a proper function of the courts, there are nevertheless other, self-imposed, limits to the scope of judicial review. In examining the constitutionality of the purposes for which tax moneys are levied or expended, this Court will consider itself bound by the State court's interpretation of the operation and effect of the State law (*Fallbrook Irrigation District* v. *Bradley, supra*); and on the question of what constitutes a public use, it will accord great respect to the State court's determination and will not upset it unless clearly unfounded. *Jones* v. *City of Portland*, 245 U. S. 217, 221-222 (1917). The New Jersey Court of Errors and Appeals has construed the legislation here questioned as "complementary to and in aid of the compulsory education statutes" (R. 51), and has found that the payments "do not constitute the expenditure of public moneys for private purposes" (R. 51).

The record contains nothing inconsistent with that finding, and this Court should consider itself bound thereby.

The traditional attitude of this Court with regard to State legislation challenged under the Fourteenth Amendment is to accord it every presumption of validity, and to resolve all doubts in favor of constitutionality, in the absence of a contrary construction by the State court. *Toombs* v. *Citizens Bank of Waynesboro*, 281 U. S. 643, 647 (1930). Mere doubt as to the constitutionality of a statute will not warrant the Court in declaring it unconstitutional; there must be something near to certainty. *Williams* v. *Baltimore*, 289 U. S. 36 (1933). A State law will not be deemed violative of the Federal Constitution if there is any reasonable principle upon which it can be sustained. *Butler* v. *Pennsylvania*, 10 How. 402 (U. S. 1850).

In other words, appellant must demonstrate with "convincing clarity" the invalidity of the challenged legislation in the light of its construction by the State court. *Corporation Commission of Oklahoma* v. *Lowe*, 281 U. S. 431, 438 (1930).

There is a total absence in the record of even an attempt by the appellant to discharge this heavy burden of proof. He offered no substantial evidence to support his claim. He barely raised the issue of the Fourteenth Amendment in his pleading (R. 9), and argued it only to the extent of one short paragraph in his brief below.

It is thus questionable whether any actual issue as to validity has been raised. But even if there has, it should, under the authorities cited, be resolved here in harmony with the discretion and interpretation of the State Legislature and the highest court of the State.

Furthermore, even if all restrictive rules were laid aside, and if this Court were to determine the question *de novo*,

it could properly reach no other result. A review of the cases in which the term "public purpose" has been considered in this Court reveals that the term has been always accorded a most elastic interpretation, capable of enlargement as the scope of governmental concern with the welfare of the people grows with the years. Its compass was expressed in *Loan Association* v. *Topeka*, 20 Wall. 655, 665 (U. S. 1874):

> "And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government * * * ."

That the free transportation of all children attending non-profit schools, in compliance with the compulsory education laws of the State, falls well within these limits is best illustrated by a consideration of the matter in relation to the police power of the State. If it is a legitimate exercise of that power, then it must be, *ipso facto*, for a public purpose.

B. *It is a Valid Exercise of the Police Power of the State.*

1. It is an aid to education.

In the field of education the State is clearly exercising its prerogative to provide for the general welfare. This Court has recognized that the promotion of literacy and the dissemination of knowledge and culture is a legitimate social aim to be achieved by the various States, and that the details of state educational programs will not be interfered with unless clearly in violation of constitutional guarantees. *Barbier* v. *Connolly*, 113 U. S. 27, 31-32 (1885); *Interstate Railway Co.* v. *Massachusetts*, 207 U. S. 79, 87 (1907); *Waugh* v. *Board of Trustees*, 237 U. S. 589, 596-597 (1914); *Meyer* v. *Nebraska*, 262 U. S. 390, 402 (1923); *Pierce* v. *Society of Sisters, supra; Board of Education* v. *Barnette*, 319 U. S. 624 (1943). This recognition of education as a subject of governmental concern has been enthusiastically subscribed to by the States themselves; and the raising of educational levels occupies an important position in the social programs of most of them.

It is self-evident that the transportation of schoolchildren is a legitimate step in furtherance of those general aims. It facilitates, and therefore promotes, better attendance and better education, especially among children to whose families twenty-two cents a day is not insignificant. It would be inconsistent with the principles of our democracy to say that that facility must be denied to some, and that they must suffer a relative hardship in the exercise of their constitutional right to send their children to an accredited school of their own choosing. The State's function is to encourage and promote education—all legitimate education. That function is not confined, so far as the Federal Constitution is concerned, to the mere support of the public

schools. The aid extended by the transportation statutes is not to the school but, as stated in *Cochran* v. *Board of Education, supra,* to "education, broadly". The expenditure is to enable the child to procure an education for the benefit of the State.

That is not to say, as appellant implies, that education is (or should be) the exclusive function of the State, and that any aid extended to a child who attends any denominational or other non-public school strikes at the foundations of the Republic. The public school, as the statutes of New Jersey and the decision of this Court in *Pierce* v. *Society of Sisters, supra,* alike recognize, is not the sole medium through which the public purpose of compulsory education may be fulfilled. The private or denominational school is neither an interloper nor a late arrival on the American scene. On the contrary, it antedated the public school by nearly two centuries. It is not a necessary evil, to be granted a bare toleration because the Constitution says so. The act of parents in sending their children to such schools is not, as appellant states at page 25 of his brief, a mere "excuse for not utilizing the public facilities afforded by the State." On the contrary, the private school, equally with the public school, is an integral part of our educational system; and attendance at it is recognized as a complete fulfilment of both the letter and the spirit of the compulsory education laws.

If a State has power to enact that all children must be educated, and that education may be obtained in a private school as well as a public one—if it has power, as this Court has held, to give free textbooks to private-school as well as public-school pupils—then it is strong medicine indeed to say that it has no power at all to spend a penny of its public money to transport a single child to any but a State school.

2. It facilitates compliance with, and is complementary to, the compulsory education laws of the State.

To carry out the established public policy that every child within the State shall receive an education, the Legislature of New Jersey not only provides free transportation to and from school but also provides the services of attendance officers, at public expense. Since New Jersey law recognizes the right of the parents to a free choice in the selection of schools, transportation is made available on equal terms for both public and private-school pupils. In like manner, the attendance officers are required to pick up truants not merely from the public schools but from all schools, and to return them—not to the public school, but to that school (whether public or private) which the child is lawfully required to attend (N. J. S. A. 18:14-35).

Appellant now claims that it amounts to a waste of public funds, and to a State establishment of religion, for Ewing Township to pay 11 cents of public money to transport a willing pupil to the Cathedral High School in Trenton. If that same pupil were to absent himself without just cause, the coercive powers of the State, through its attendance officers and the police, would be employed to seize his body and to deliver him under compulsion at the doors of the Cathedral High School; and in that case the bill to the taxpayers would include not merely the transportation expenses of the pupil but the transportation expenses, and a proportionate part of the salary, of the attendance officer. If the pupil's absence were attributable to his parents, the whole judicial panoply of Court, sheriff, district attorney and jailers would be employed against them at the taxpayers' expense — all in "direct aid," as the appellant would say, of the same Cathedral High School. It is hard to see why the expenditure of public money is any less objectionable for one purpose than for the other.

The provision of free transportation, on an equal and non-discriminatory basis, makes it possible for parents to comply with the compulsory education statutes (for violation of which they are punishable), and still leaves them free to exercise their constitutional rights of choice of school. It is in aid of, and complementary to, those statutes, as the court below expressly found (R. 50-51). To the same effect, see *Nichols* v. *Henry*, 301 Ky. 434, 191 S. W. (2d) 930 (1945); *Adams* v. *County Commissioners*, 180 Md. 550, 26 A. (2d) 377, 380 (1942).

3. It promotes the health, safety and welfare of the schoolchildren of the State.

No elaborate proof is necessary to sustain the proposition that free transportation for children residing distant from their schools means less fatigue and less exposure to bad weather, and more time for rest, relaxation and study. It also means a mitigation of the dangers to life and limb to which children are subject in traveling afoot on vehicular highways. That factor alone is a sufficient reason to sustain the legislation in question. A similar statute of Maryland was challenged as violating the Fourteenth Amendment. The Maryland Court of Appeals upheld the measure as one enabling the State to protect schoolchildren from the hazards of the road. *Board of Education* v. *Wheat*, 174 Md. 314, 199 Atl. 628 (1938). See also *School District* v. *Wright*, 128 Okla. 193, 261 P. 953 (1927), and *Nichols* v. *Henry*, *supra*. All other grounds aside, the factor of physical safety alone brings this case within the proper sphere of the police power, and thus is sufficient to sustain the decision below.

C. Since the main purpose of the statute is public, it does not become unconstitutional by reason of any incidental benefit to individuals.

Appellant argues that the incidental advantage which, he claims, accrues to private schools is sufficient to defeat the public purpose of the statute. That argument finds no support in the decisions of this Court, which has consistently refused to place any such narrow restrictions upon the power of State Legislatures to provide for the general welfare. In *Noble State Bank* v. *Haskell*, 219 U. S. 104 (1911), this Court upheld the power of the State of Oklahoma under the due process clause to assess state banks for a depositors' guaranty fund; and Mr. Justice Holmes observed, at p. 110:

> "* * * we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. * * * The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. * * * there is no denying that by this law a portion of its property might be taken to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. * * * it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for, what, in its immediate purpose is a private use."

In line with that decision, the *Cochran* case upheld the use of the taxing power with respect to free textbooks as being "for a public purpose" (281 U. S. at p. 375). This Court has frequently adhered to the same principle in refusing to invalidate legislation under the Fourteenth Amendment in the face of claims that the taking is not for a public purpose because there may be some incidental advantage to a private individual or group. See *Carmichael* v. *Southern Coal Co., supra,* upholding the Alabama Unemployment Compensation Act; *Milheim* v. *Moffat Tunnel Dist.,* 262 U. S. 710 (1923), sustaining assessments upon property for the purpose of financing a public tunnel improvement, despite the fact that it was located so as to be practically part of the line of a private railroad; *Clark* v. *Nash,* 198 U. S. 361 (1905), and *Hariston* v. *Danville & Western Ry.,* 208 U. S. 598, 608 (1908), holding valid the condemnation of property as for a public purpose, despite substantial collateral advantages to individuals. The same principle has been applied in State court decisions upholding free transportation statutes of other states,—notably *Nichols* v. *Henry, supra,* quoted *infra,* p 36.

III

The New Jersey Statute does not constitute an establishment of religion.

Appellant's attack on the New Jersey legislation has a two-fold aspect. He urges, *first,* that it amounts to a deprivation of property without due process of law because private property is, he claims, taken for a private purpose. He urges, *second,* that it amounts to an establishment of religion. Under his first contention, he relies directly upon the Fourteenth Amendment. Under the second, he relies upon the First Amendment, as incorporated by implica-

tion in the Fourteenth. The two contentions, as applied to the facts of this case, necessarily overlap, since his basic argument is that public moneys are being misapplied to an unlawful purpose—namely, the support of private institutions, some of which have a religious character.

Appellant's claim with respect to the First Amendment is in the nature of an afterthought, since he did not even mention it in his brief below. His only argument below on the Federal question was based on the claim, now abandoned, that the New Jersey statute was unconstitutional because it discriminated against private schools operated for profit. The argument based on the First Amendment is, however, now advanced in his brief here, and reiterated in the briefs of the *amici curiae* who have entered the lists on his behalf.

The First Amendment has a "double aspect." *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940). It condemns legislation (i) respecting "an establishment of religion," and (ii) prohibiting the "free exercise" of religion. By its terms it is a prohibition on Congress alone. The "free exercise" provision at least, by decisions of this Court, has become, *via* the Fourteenth Amendment, a prohibition on the States as well. *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Davis* v. *Beason*, 133 U. S. 333 (1890); *Reynolds* v. *United States*, 98 U. S. 145 (1878).

The statute here involved makes no mention of any religion and "establishes" none. With the sole (and reasonable) exception of schools operated for profit, it applies equally to all schoolchildren and all schools of the State. Another provision of New Jersey law (N. J. S. A. 18:19-7) defines a "private school" broadly as "a school, attendance at which is a sufficient compliance with the compulsory education requirements contained in the State statutes." The transportation statute is for the benefit of all children

attending schools in compliance with the compulsory education laws of the State, whether those schools be public or private.

Some private schools may be denominational. Others may not. So long as a school imparts instruction "equivalent to that provided in the public schools" (N. J. S. A. 18:14-14) and is not operated for profit, parents are entitled to have their children transported to it at public expense, regardless of whether the school is operated by any denomination or by none.

The argument of appellant, and of the *amici curiae* on his side, starts with a fundamental confusion between the term "an establishment of religion" and the term "a religious establishment." Based upon that confusion, they argue that because some of the private schools whose pupils receive free bus rides might be called "religious establishments," it is therefore unconstitutional to take any steps to help any pupils travel to any private schools at all.

As pointed out by Mr. Justice Peckham in *Bradfield* v. *Roberts*, 175 U. S. 291, 297 (1899) "an establishment of religion" is by no means synonymous with "a religious establishment." In that case this Court upheld the validity of a Congressional grant of money to a non-profit hospital operated by a Roman Catholic religious order in the District of Columbia, against the challenge that that grant promoted the establishment of a religion. The hospital, a corporate (and therefore non-denominational) entity, was deemed to be the primary beneficiary, and the First Amendment was thus held not to prohibit collateral benefits to religion where the main purpose of the legislation is public in character.

To the proposition, so earnestly advanced both by appellant and by the *amici curiae* who have filed briefs on his behalf, that the separation of Church and State is a funda-

mental principle of our government, we whole-heartedly agree. No one would wish it otherwise. But it does not follow from this, as appellant implies, either that the two are irretrievably committed to perpetual hostility, or that when the interests of both happen to coincide, the Constitution requires that the interests of both should be either ignored or frustrated.

The Founding Fathers took no such view when they wrote into the Northwest Ordinance of 1787:

> "Article III. Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged * * *"

Nor did this Court take such a view when it declared in *Pierce* v. *Society of Sisters* (*supra*, p. 2) that "the child is not the mere creature of the state", or when it upheld the Louisiana school-book statute in *Cochran* v. *Board of Education* (*supra*, p. 6). Nor did the Supreme Court of Mississippi, when it upheld a similar school-book statute, saying (*Chance* v. *Mississippi State Text-book Rating and Purchasing Board*, *supra*, 200 So. 706, 709-710):

> "Useful citizenship is a product and a servant of both the church and the state, and the citizen's freedom must include the right to acknowledge the rights and benefits of each, and to import into each the ideals and training of the other.
>
> "There is no requirement that the church should be a liability to those of its citizenship who are at the same time citizens of the state, and entitled to privileges and benefits as such. Nor is there any requirement that the state should be godless or should ignore the privileges

and benefits of the church. Indeed, the state has made historical acknowledgment and daily legislative admission of a mutual dependence one upon the other.

"It is the control of one over the other that our Constitution forbids. Sections 18, 208. The recognition by each of the isolation and influence of the other remains as one of the duties and liberties, respectively, of the individual citizen. It is not amiss to observe that by too many of our citizens the political separation of church and state is misconstrued as indicating an incompatibility between their respective manifestations, religion and politics. The state has a duty to respect the independent sovereignty of the church as such; it has also the duty to exercise vigilance to discharge its obligation to those who, although subject to its control, are also objects of its bounty and care, and who regardless of any other affiliation are primarily wards of the state. The constitutional barrier which protects each against invasion by the other must not be so high that the state, in discharging its obligation as parens patriae, cannot surmount distinctions which, viewing the citizen as a component unit of the state, become irrelevant.

"The religion to which children of school age adhere is not subject to control by the state; but the children themselves are subject to its control. If the pupil may fulfill its duty to the state by attending a parochial school it is difficult to see why the state may not fulfill its duty to the pupil by encouraging it 'by all suitable means.' The state is under duty to ignore the child's creed, but not its need."

Appellant's fundamental misconception of the purpose of the New Jersey legislation, and of the issue in this case,

is perhaps best shown by the following statement made at page 26 of his brief:

> "There is no reason why children should not attend a public school nor any reason why they should not be compelled so to attend *except their freedom of choice in the matter of religion* which extends to schools in connection with religion. But to say that the parents may not only be *excused* from sending their children to the public schools but shall be paid for exercising this choice is extending religious liberty beyond anything heretofore suggested * * *." (Italics ours).

The vice inherent in this quotation pervades the briefs of the *amici curiae* who have joined with the appellant. To talk of parents being "excused" from sending their children to the public schools and being "paid for exercising this choice" betrays confusion of thought.

Parents are not "excused" from sending their children to the public schools. They are under no obligation to do so; and no "excuse" is needed. In the case at bar no payment was made to the parents for "exercising a choice" between the public and the private schools.

Throughout appellant's argument there is implicit the idea that education and everything connected with it are the prerogative of the State and that "excuses" and "exemptions" from public school attendance should be narrowly construed and are granted only because of religious scruples.

In *Pierce* v. *Society of Sisters, supra,* this Court disposed of any such idea when it declared broadly that no government in the Union had any power "to standardize its children by forcing them to accept instruction from public teachers only" (268 U. S. at p. 535).

The fundamental liberty recognized in that case is parental liberty, not religious liberty. The paramount right of the parent to decide how his child is to be educated is not restricted to a choice in matters of religion only (*Meyer* v. *Nebraska, supra*); nor does the New Jersey statute impose any such restriction. A parent who sends his child to the school of his choice, whether religious or non-religious, is performing his legal duty and exercising his constitutional parental rights, rather than his religious rights. Under New Jersey law, and under the Constitution, the parent has as much right to send his child to a non-denominational private school in which no religious teaching is given as he has to send him to any other school, public or private. He may choose the school because he likes the teacher, or because he prefers its instruction in manual training or foreign languages, or for any other reason which appeals to him as a parent. Provided only that the school (whatever it is) meets the requirements imposed by statute, the parent in any such case has fully discharged his duties under the law and is as much entitled to reimbursement for transportation as are any of the appellee parents in the case at bar.

The existence of private schools (some of them religious and some of them not) during the entire period from the adoption of the Constitution to the present has never been deemed dangerous to our liberties*. The right of the

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* The arguments of William D. Guthrie, Esq. in *Pierce* v. *Society of Sisters* (summarized in 268 U. S. at pp. 514 and 515) are most pertinent:

"Private and religious schools have existed in this country from the earliest times. Indeed, the public or common school, as we know it today, dates only from 1840. For generations all Americans—including those who fought for liberty and independence in the eighteenth century, and who drafted the Declaration of Independence, the Northwest Ordinance of 1787, and the Constitution of the United States—were educated in private or religious schools, and mostly the latter. Perhaps no

parents, *as parents,* to choose such schools needs no "excuse" or "exemption." Appellant's argument that the payment of bus transportation to all parents, on an equal and non-discriminatory basis, amounts to a union of Church and State because some parents may send their children to religious schools, finds no basis either in logic or in the statute here under attack.

Properly stated, the question in the present case is

> Does a grant of free bus transportation to *all* school children amount to legislation respecting "an establishment of religion" simply because children attending non-public schools (some of which are denominational) are not excluded from the grant?

If the legislation in question had declared that only children of a particular denomination might ride free, while all others must walk or pay their own way, there would be some force to appellant's claim. But it did not. Like the textbook legislation in *Cochran* v. *Board of Education,* (*supra* p. 9):

> "Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

But, says the appellant, the legislation also benefits, at least incidentally, the school as well as the child; and since

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institution is older or a more intimate part of our colonial and national life than religious schools and colleges, both Catholic and Protestant. The private and religious schools have been the laboratories in which educational methods have been worked out and pedagogic progress accomplished from the very beginning of our history. Out of them have developed, or to them is due, our greatest colleges and universities, the most important of them to this day being private or religious institutions."

(in the case of some of the schools covered by the statute) a part of the curriculum may be devoted to religious instruction, the legislation indirectly benefits religious institutions, and is therefore void in its entirety.

Under the policy of New Jersey, as of other States, private schools, whether denominational or not, receive a very direct pecuniary advantage through exemption from local taxes—granted on the theory that they exist for the public benefit and perform a public function. Yet notwithstanding that exemption, they are protected, like their neighbors, by tax-supported fire and police departments and a host of other public services, without any question raised of the "establishment of religion."

As compared with the very direct pecuniary benefits which accrue from the policy of tax exemption, let us see just what "benefits" a denominational or other non-public school may be said to obtain from the transportation statute here involved. Under that statute, the school's expenses are not reduced a penny, nor is a penny added to its income. It receives no services or equipment or supplies. The bus-stop sign on the street corner marks also the limit of the public expense. Wherein, then, has the school profited? Do students attend in greater numbers than they would if their parents were forced to send them elsewhere or nowhere in order to avoid the transportation expense? This may be, though the record is barren of evidence on that score. Do the enrolled students attend more regularly? Possibly. Are they better fitted for study when they arrive, and do they thus lighten the task of instruction? Undoubtedly. The conclusion nevertheless remains the same—that private or religious interests are advanced by this legislation only to the extent that they coincide with, and are part of, the public interest. The benefits, if any there be,

to the denominational or private schools are not only abstract and relatively minor; they are also purely incidental and unavoidable.

Appellant's argument on the "benefit" theory was thus answered in a recent decision of the Court of Appeals of Kentucky, upholding the constitutionality of a statute similar to that here involved, (*Nichols* v. *Henry, supra*), in which it said (191 S. W. (2d) at pp. 934-935):

> "In this advanced and enlightened age, with all of the progress that has been made in the field of humane and social legislation, and with the hazards and dangers of the highway increased a thousandfold from what they formerly were, and with our compulsory school attendance laws applying to all children and being rigidly enforced, as they are, it cannot be said with any reason or consistency that tax legislation to provide our school children with safe transportation is not tax legislation for a public purpose. Neither can it be said that such legislation, or such taxation, is in aid of a church, or of a private, sectarian, or parochial school, nor that it is other than what it is designed and purports to be, as we have stated hereinabove—legislation for the health and safety of our children, the future citizens of our State. The fact that in a strained and technical sense the school might derive an indirect benefit from the enactment, is not sufficient to defeat the declared purpose and the practical and wholesome effect of the law."

It would be difficult indeed to draft a police-power statute, however broad its scope, which would not in its operation redound to the incidental benefit of some particular classes or groups but which would benefit directly each

and every individual citizen in exactly the same manner and extent. State agricultural services directly benefit only the farmers. Workmen's compensation and social-security acts discriminate against those who enjoy inherited incomes in favor of those who do not. The very policy of free compulsory education favors the poor and prolific at the expense of the rich and childless. The simple fact is that as the State does its part to lessen the respective peculiar problems of the various constituent groups of the community, so fares the common weal. Allocation of direct benefit is thus a poor criterion of constitutionality. The far better test is whether the principal and ultimate effect of a law is to promote the general welfare. If it does, the benefits, whether direct or incidental, may fall where they will.

Who, then, are the overall beneficiaries of this free transportation program? Primarily, the State itself profits greatly from this measure. As already mentioned, the fostering of juvenile education and the partial solution of the public safety problem are among the achievements. There is also the result, as found by the court below (R. 50-51), that the providing of universal free transportation aids in the enforcement of the compulsory education laws. The State must be conceded the power to enact one set of laws reasonably calculated to insure compliance with another admittedly valid set.

Secondly, there are the children themselves, who form an integral class in the community and for whose benefit specific legislation is unquestionably permissible. The assistance to them, in all its phases, has been already set forth.

Finally, the parents of the children concerned are compensated directly. Parents form an interest group of considerable size, especially when composed of all parents en-

joying the use of non-profit schools. A cash reimbursement to them is not an inappropriate assistance, where the final cost of discharging legal duty must, in many cases, loom large.

Such are the real beneficiaries of this program. Their benefits are real. Their relative importance in the community is great.

The sum of these fractional participations represents, not unnaturally, a substantial, if less specific, benefit to the community as a whole. It consumes the loaf; there remain only the crumbs—namely, the alleged incidental benefits claimed to accrue to such of the non-public schools as happen to be denominational. The possibility of such benefits cannot render the statute unconstitutional.

In our discussion thus far we have accepted, *arguendo*, appellant's argument that aid to a school is the same as aid to a church, or, as was said in the dissent below (R. 62), that "parochial schools are a part of the ministration of the church under whose control they are." That argument is a misleading distortion of the truth. While it is perfectly true that most denominational schools teach the religious tenets of their denominations as part of the curriculum, those schools are something more than mere adjuncts of the church with which they may be affiliated. They are also (and primarily) educational institutions recognized and approved by the State* as taking a full and legitimate part

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* The New Jersey statute (N. J. S. A. 18:19-7) defines a private school as "- school, attendance at which is a sufficient compliance with the compulsory education requirements contained in the state statutes."

Various sections of the New Jersey Education Law apply specifically to private schools, e.g. N. J. S. A. 18:19-1 (prohibiting corporal punishment), 18:19-2 to 19-9, inclusive (prescribing regular courses of study in accident prevention, fire prevention, and the Constitution of the United States), 18:3-8 (requiring annual reports to the State Commissioner of Education), 18:20-8 (requiring private schools, as a condition precedent to confering degrees, to submit to conditions prescribed by the State Board of Education).

in the program of compulsory education, and engaged in the task of helping parents to perform a duty laid upon them, under criminal sanctions, by State law.

Appellant necessarily assumes that if a religious denomination operates an institution devoted primarily to extra-religious purposes, then any benefit to that institution is *per se* an aid to the establishment of religion. That line of argument was rejected by this Court in *Bradfield* v. *Roberts* (*supra*, p. 29), where a cash grant by Congress to a hospital operated under the exclusive auspices of the Roman Catholic Church was held not to be in violation of the First Amendment. There is no reason why an otherwise valid police-power statute should stand discredited on the ground that it may remotely and incidentally encourage all believers in their adherence to their respective creeds.

Our position on this point has been sustained in all previous cases where this Court has had occasion to deal with the aid-to-religion question under either the First or Fourteenth Amendments. In addition to *Bradfield* v. *Roberts* and *Cochran* v. *Board of Education, supra*, *Quick Bear* v. *Leupp*, 210 U. S. 50 (1908), upheld the disbursement of Indian Educational funds, of which the Government was trustee, to the Bureau of Catholic Indian Missions, over the protest that it constituted the use of money in furtherance of a religion, and despite the fact that obvious collateral advantages would accrue to the religious denomination concerned. Appellant fails to cite a contrary holding, as revealed by a consideration of the authorities collected by him.

In his argument on the religious issue below (which he urged under the State Constitution only), appellant cited six State Court decisions adverse to legislation of the type here involved. All of them were cited in the dissent below (R. 55-58); all of them reappear in one or more of the briefs in

support of appellant's claims here. In none of those cases did the State Courts attempt to interpret or apply any Federal constitutional limitations. All of them turned on the interpretation of local constitutional or statutory provisions. None of them, we submit, has any application to the issue here. Of the six States involved, it is interesting to note that three have subsequently granted transportation privileges to private-school pupils, in one case by constitutional amendment, in another by a subsequent court decision which distinguished and limited the earlier case relied on by appellant, and in the third by a new statute, the validity of which is currently in litigation.

The six decisions referred to, arranged chronologically, are as follows:

1. *State ex rel Van Straten v. Milquet*, 180 Wis. 109, 192 N. W. 392 (1923).

The statute in question (Wisconsin Laws of 1921, Sec. 40.16, subd. 1(c)) provided that if any local district suspended its public school, it must pay for the tuition of children in some adjoining district, and must provide transportation "to and from school" during the period of suspension. The court decided merely that that statute contemplated transportation to adjoining public schools only, and that under its provisions a local board had no authority to make a contract to transport children to a nearby parochial school.

The statute was later amended to provide that when a local public school was closed, the district must pay for the tuition of those children who attended adjacent public schools, and must provide transportation for *all* children who resided more than two miles from "the nearest school which they may attend" (Wisconsin Laws of 1939, Sec.

40.34 (1) and (2)). The amendment was held by the Circuit Court of Chippewa County (*Rutz* v. *Marek*, unreported, decided in 1941) to authorize the transportation of parochial-school children. Its validity was sustained by that Court against attack under the Wisconsin Constitution, which prohibits sectarian instruction in the public schools (Art. X, Sec. 3) and provides (Art. I, Sec. 18):

> "* * * nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

After the decision in *Rutz* v. *Marek*, Sec. 40.34 (2) of the Wisconsin Laws was again amended by Wisconsin Session Laws, 1943, Ch. 526, Sec. 1. The amendment struck out the reference to children residing more than two miles from "the nearest school which they may attend" and substituted a reference to children residing more than two miles "from the nearest *district school or federal school* which they may attend."

In *Costigan* v. *Hall*, 23 N. W. (2d) 495 (decided June 22, 1946, not yet officially reported), the Supreme Court of Wisconsin held that under this amendment to the statute the transportation of parochial-school pupils was unauthorized. It also held that in the particular case before it the school district was not authorized to transport *any* pupils, public or private. Although requested by counsel for both sides to decide the case on constitutional grounds, the court declined to do so.

At the forthcoming election of November 1946 the voters of Wisconsin will pass upon a constitutional amendment reading as follows:

> "(Article X) Section 3. The legislature shall provide by law for the establishment of district schools,

which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein, *except that such prohibition shall not bar the legislature from providing for the transportation of children to and from any school or institution of learning.*" (The amendment adds the italicized words.)

2. *State ex rel Traub* v. *Brown*, 36 Del. 181, 172 Atl. 835 (1934).

In this case the Legislature (Delaware Laws, Vol. 38, ch. 142) appropriated $5,000 for the purpose of transporting pupils "attending daily free schools supported by any church or religious society and located outside of the city of Wilmington." The Superior Court, New Castle County, held the appropriation unconstitutional under a provision of the State Constitution which prohibited appropriations "in aid of any sectarian, church or denominational school". (Del. Const., Art. X, Sec. 3). On writ of error, the Supreme Court of the State did not pass on the merits, but dismissed the case as moot (39 Del. 187, 197 Atl. 478 (1938)), on the ground that the appropriation in question had been made available only for a limited time, and that that time had expired pending the appeal.

3. *Judd* v. *Board of Education*, 278 N. Y. 200, 15 N. E. (2d) 576 (1938).

In 1936 the New York Legislature provided in substance that whenever a school district furnished transportation for public-school pupils, it must furnish equal facilities for private and parochial school pupils (N. Y. Laws of

1936, ch. 541, amending Sec. 206 of the Education Law). The Court of Appeals*, by a 4 to 3 decision, held this legislation unconstitutional under a provision of the State Constitution which said:

> "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, *directly or indirectly*, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught." (N. Y. Constitution, Art IX, Sec. 4, since renumbered and now embodied in Art. XI, Sec. 4.) (Italics ours.)

The majority opinion held that the furnishing of transportation is exactly on a par with the furnishing of textbooks (an interesting point, in view of this Court's decision in *Cochran* v. *Board of Education*, *supra*), and that both are equally illegal because they tend to aid, or "promote the interests of" the school. Considerable reliance was placed on the words "directly or indirectly" in the Constitutional provision quoted above.

A vigorous dissenting opinion was written by Chief Judge Crane, in which he said (278 N. Y. at p. 220; 15 N. E. (2d) at p. 586):

> "Having made attendance upon instruction compulsory and having approved of attendance at certain

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* The Supreme Court, Nassau County, had sustained the constitutionality of the legislation (*Judd* v. *Board of Education*, 164 Misc. 889) and had been unanimously affirmed, without opinion, by the Appellate Division, Second Department (253 App. Div. 907).

schools other than public schools, the Legislature determined that the inhabitants of the district should have the power, under certain conditions, to provide for the transportation of the pupils to and from the schoolhouse in the district or the school which they legally attend. The object of such legislation is apparently to insure the attendance of the children at their respective schools for the requisite period of instruction and, perhaps, to safeguard the health of the children. The statute is not designed to aid or maintain the institutions themselves. Recognizing the right of the children to be sent to such schools, and enjoining upon them the duty of regular attendance, the Legislature gave the authorities power, in a proper case, to assist the children in getting to their school. The law says to the children and parents: Having chosen a proper school, you must attend regularly. The school district has been given the power to add to that: Where necessary, we shall assist you in getting there."

The decision in *Judd* v. *Board of Education* was delivered in May 1938. In November of that same year the voters of New York amended their Constitution to overcome the effect of that decision, by adding at the end of the constitutional provision quoted *supra*, p. 43, the following:

"• • • but the legislature may provide for the transportation of children to and from any school or institution of learning." (N. Y. Const. Art. XI, Sec. 4.)

Under that amendment New York now provides equal transportation facilities to all schools, public and private

(N. Y. Education Law, Section 206 (18) and 503, added by Laws of 1939, ch. 465).

4. *Gurney* v. *Ferguson*, 190 Okla. 254, 122 P. (2d) 1002 (1941), cert. den. 317 U. S. 588 (1942).

Ch. 34, Oklahoma Session Laws of 1939, provided, like similar statutes in several other states, that private and parochial school children should be entitled to transportation on the regular public-school bus routes. The Supreme Court of Oklahoma held that law unconstitutional under Art. II, Sec. 5, of the Oklahoma Constitution, which provides:

> "No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such."

The decision was based largely on the majority opinion of the New York Court of Appeals in *Judd* v. *Board of Education, supra.*

The plaintiffs (parents of private-school children), who had initiated the litigation, and who had been unsuccessful in the Oklahoma Supreme Court, thereupon appealed to this Court. The appeal was dismissed for lack of jurisdiction; and this Court, treating the appeal as a petition for certiorari, denied the petition (317 U. S. 588; rehearing denied 317 U. S. 707 (1942)).

The dissenting opinion in the Court of Errors and Appeals of New Jersey in the case at bar (R. 53-4), and the

brief of the appellant here (p. 18) make some point of that denial. The denial of a petition for certiorari is, of course, not equivalent to a decision on the merits (*Atlantic Coast Line R. Co.* v. *Powe*, 283 U. S. 401 (1931); *U. S.* v. *Carver*, 260 U. S. 482 (1923)); and in *Gurney* v. *Ferguson* there appears to have been no Federal question for this Court to review.

5. *Sherrard* v. *Jefferson County Board of Education*, 294 Ky. 469, 171 S. W. (2d) 963 (1942).

Ch. 66 of the 1940 Acts of Kentucky provided that private-school pupils should receive the same transportation privileges as public-school pupils. The Court of Appeals of Kentucky, relying on *Judd* v. *Board of Education, supra,* and *Gurney* v. *Ferguson, supra,* held that Act unconstitutional under various sections of the Kentucky Constitution relating to the common-school fund. The basis for the decision was that that fund was earmarked by the Constitution for public schools only, and that no payment could be made out of it for any other purpose.

Two years after that decision, the Kentucky Legislature enacted another law (Ch. 156 of the 1944 Acts), reciting that the health and safety of all children were endangered by walking along the highways to and from school, and providing that the various counties might furnish transportation out of their general funds (and not out of funds specifically earmarked for education) to all children living beyond reasonable walking distance from their respective schools and where there were no sidewalks upon which they might travel. The constitutionality of the new Act, as applied to private-school pupils, was unanimously sustained by the Kentucky Court of Appeals in *Nichols* v.

Henry, supra. The earlier decision in *Sherrard* v. *Jefferson County Board of Education* was distinguished on the ground that it held merely that public-school funds could not be used for the transportation of children attending private schools.

6. *Mitchell v. Consolidated School District No. 201*, 17 Wash. (2d) 61, 135 P. (2d) 79 (1943).

Chapter 51 of the 1941 Laws of Washington, like the statutes in several other States, provided that private and parochial school children should be entitled to free transportation along the regular public-school bus routes. The Supreme Court of Washington, by a closely-divided vote, held the Act unconstitutional under the following provisions of the State Constitution:

Art. 9, §2:

> "The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund, and the state tax for common schools, shall be exclusively applied to the support of the common schools."

Art. 9, §4:

> "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."

Art. 1, Sec. 11:

"No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment."

Of the nine Justices sitting, four held the legislation unconstitutional under all of the provisions quoted. Another Justice concurred in the result, but stated that there was no objection to the use of public funds (other than the common-school fund) to transport pupils to *non-sectarian* private schools. The remaining four Justices dissented, deeming the legislation constitutional in its entirety.

It should be noted that all of these six decisions, with the exception of *State ex rel Van Straten* v. *Milquet* (*supra*, p. 40), which involved merely a question of statutory construction, turned on the interpretation of State Constitutions which prohibited, in various rather specific forms, the appropriation of funds in aid of denominational institutions. In this connection it is not amiss to point out that the language of those State Constitutions was considerably more restrictive than that of the First Amendment, which prohibits merely legislation "respecting an establishment of religion". So far as the Federal Constitution is concerned, there is no reason for striking down a State statute which, like the Louisiana school-book statute, extends aid impartially to all children alike, including those who happen to attend denominational schools. And even with respect to the interpretation of the State Constitutions involved, the arguments on the other side (as exemplified by the dissent in *Judd* v. *Board of Education*, *supra*, p. 43) merit close consideration.

The six cases cited by appellant do not represent the whole law on the subject. As against them, the courts

of at least five States beside New Jersey have squarely sustained the constitutionality of either school-book or transportation legislation for the benefit of private-school pupils, under similar constitutional provisions of the States, and in some cases under the Fourteenth Amendment as well.

In addition to the decisions in Louisiana (affirmed by this Court) and in Mississippi sustaining the constitutionality of free textbook legislation,* the following cases have sustained the validity of transportation statutes similar to that of New Jersey:

Board of Education of Baltimore County v. *Wheat*, 174 Md. 314, 199 Atl. 628 (1938).

In this case the Court of Appeals of Maryland sustained a statute which provided that all children who attended schools in Baltimore County which did not receive State aid and who resided on or along or near public highways on which public-school buses were operated should be entitled to transportation on those buses. The Court rejected arguments of unconstitutionality based not only on the State Constitution but also on the Fourteenth Amendment, saying (199 Atl. at 632):

> "Starting with the interest which the state is acknowledged to have in seeing that all children of school age acquire an education by attending some school, and the fact that they are complying with the law in going to such a school as the parochial school involved in this case, their accommodation in the buses appears to the court to be within the proper limits of enforcement of the duty imposed. Compliance having been

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* *Cochran* v. *Louisiana State Board of Education*, *supra*, page 8; *Chance* v. *Mississippi State Textbook Rating and Purchasing Board*, *supra*, page 11.

made dangerous in a much greater degree, removal of the danger to any extent would seem to be within the same public function."

Adams v. *County Commissioners of St. Mary's County*, 180 Md. 550, 26 A. (2d) 377 (1942).

In that case a local act of the Maryland Legislature required the Commissioners of St. Mary's County to levy and appropriate $10,000 annually "for the transportation to and from school of children attending schools in St. Mary's County not receiving aid from the State". The local authorities carried out the statutory mandate by making direct cash grants to parochial schools to enable them to operate their own school buses. The Court of Appeals of Maryland, affirming its earlier decision in *Board of Education* v. *Wheat, supra*, sustained the constitutionality of the statute and of the action of the local authorities, under both the Maryland Constitution and the Fourteenth Amendment.

Nichols v. *Henry*, 301 Ky. 434, 191 S. W. (2d) 930 (1945).

This case has already been cited *supra*, pp. 25, 36. In it the Court of Appeals of Kentucky sustained the validity of a statute which authorized appropriations for the transportation of all pupils attending school "in compliance with compulsory school attendance laws."

Bowker v. *Baker*, 167 P. (2d) 256 (California District Court of Appeals, March 26, 1946, not yet officially reported). In this case the court sustained a statute authorizing school boards to give to pupils "in attendance at a school other than a public school" transportation "upon the same terms and in the same manner and over the same routes of travel" as public-school pupils. The California Constitution (Art. IV, §30) contained the usual provisions against appropriation in aid of sectarian institutions, but

those provisions were held not infringed by the statute in question. The Court stated (167 P. (2d) at 262):

> "When we consider the complexities of our modern life we realize that many expenditures of public money give indirect and incidental benefit of denominational schools and institutions of higher learning. Sidewalks, streets, roads, highways, sewers are furnished for the use of all citizens regardless of religious belief. No one has yet challenged the right of any law abiding citizen to travel to a school over a highway built with public funds because of his religious beliefs or because he is attending a denominational institution, yet to paraphrase the expression used in *Judd* v. *Board of Education, supra,* without roads over which pupils could reach the school there would be no school. Police and fire departments give the same protection to denominational institutions that they give to privately owned property and their expenses are paid from public funds. If St. Anne's Parochial School caught fire would the plaintiff argue that the Porterville fire department responding to the call should stand by idle until the flames spread to privately owned buildings before attempting to extinguish the conflagration because the cost of the fire-fighting equipment and the salaries of the firemen are paid by funds raised by general taxation?"

The reasoning behind all of these cases is the same as that already advanced in this brief, and in exact parallel to that laid down by this Court in *Cochran* v. *Board of Education*—namely, that the education of all children is a public purpose, that the protection of all children from the dangers of the highway is likewise a public purpose, that

aiding all children to get to school is therefore a public purpose, and that any remote or incidental advantage or benefit which may accrue to the school which he attends does not render the legislation unconstitutional.

In addition to the States involved in the decisions listed above, a substantial number of other States have similar legislation now on their books. All of it is necessarily under attack in the present litigation. Under the next point we shall summarize that legislation, and give some indication of the extent to which appellant's claims must go.

IV

A decision holding the New Jersey Statute unconstitutional would strike down similar legislation in at least fifteen other States, would cast doubt upon the validity of several Acts of Congress, and would forever disable all of the States from legislating with respect to the transportation of children other than those attending public schools.

A. *State Legislation.*

In Appendix A to this brief (*infra*, p. 61) we have summarized the present status of school bus legislation in all of the States and the District of Columbia, with references to applicable decisions of the courts and of the State Attorneys General. A brief summary of the situation is as follows:

Sixteen States and the District of Columbia have legislation which authorizes or requires, in one form or another, transportation for private-school pupils (California, Dis-

trict of Columbia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New Jersey, New York, Oregon and Rhode Island). Of these, the legislation has been sustained as constitutional by the courts in *four* (California, Kentucky, Maryland and New Jersey) and by opinions of the Attorneys General in *six* (Indiana, Louisiana, Massachusetts, Michigan, Missouri and New Hampshire). In Louisiana free textbook legislation for the benefit of private-school pupils has been sustained, under both the State and Federal Constitutions, by the Courts of the State and by the Supreme Court of the United States. In New York the transportation provision was embodied in a constitutional amendment to overcome a 4 to 3 decision of the Court of Appeals invalidating an earlier statute.

Two States have statutes susceptible of interpretation in favor of private-school pupils, and opinions of their Attorneys General that the statutes are to be construed in their favor (Colorado and Minnesota).

One State (Mississippi) has a transportation statute which is susceptible of an interpretation in favor of private-school pupils but which has not been officially construed, and a free textbook statute applicable to private-school pupils which has been sustained as constitutional.

Three States (Maine, North Dakota and South Dakota) have statutes susceptible of interpretation in favor of private-school pupils, but local rulings adverse to those pupils (Opinions of Attorneys General in Maine and North Dakota; implication from court decision in South Dakota.)

Eight States have statutes susceptible of interpretation in favor of private-school pupils, with no official ruling either way (Arizona, Arkansas, Connecticut, Nevada, Utah Vermont, West Virginia and Wyoming). Under local practice, at least three of these are reported to be currently

furnishing transportation to private-school pupils (Connecticut, Ohio and West Virginia).

Fourteen States, either by the specific language of their statutes, or by necessary implication, appear to provide for public-school pupils only (Alabama, Delaware, Florida, Georgia, Idaho, Nebraska, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee and Virginia). In two of these the legislatures have attempted to provide for private-school pupils as well, but have been blocked by local decisions under the State Constitutions (Delaware and Oklahoma).

In *four States* the situation is currently unsettled as follows:

Iowa—Statute ambiguous, conflicting opinions of Attorneys General, and litigation pending.

Texas—Statute ambiguous and litigation pending.

Washington—Statute specifically provides for private-school children. Prior statute held unconstitutional under State Constitution. Litigation pending on present statute.

Wisconsin—Statutes several times amended, with varying decisions as to construction. Constitutional issue argued but not decided in latest case. Constitutional amendment authorizing transportation of private-school pupils to be voted on in November 1946.

As the foregoing summary indicates, the unmistakable trend of legislative policy has been in the direction of affording equal transportation facilities to all pupils attending school in obedience to the compulsory education laws of the State, regardless of what school they may attend. More and more legislatures have recognized the necessity, from

the standpoint of health and safety, of getting children off the highways, and the justice of affording equal treatment to all classes covered by the compulsory education laws. The parents of non-public school pupils, after all, contribute like everyone else their equal share of taxes; it is certainly not unfair that they should share, where possible, in direct expenditures made therefrom.

The New Jersey statute here under attack is not an isolated instance of action by a single State legislature. On the contrary, it represents a deliberate attempt to deal with a local need and to solve a local problem, in accordance with the trend of legislation elsewhere and in accordance with enlightened present-day ideas of the duties of the State. If that statute is invalid under the Fourteenth Amendment, as appellant claims, then all similar statutes in other States are equally invalid.

By the same token, if it is unconstitutional under the Fourteenth Amendment to spend the taxpayers' money to send a child to a parochial school, it is equally unconstitutional to spend the taxpayers' money to furnish that child with textbooks and school supplies for use at the same school. Yet free textbook legislation, bearing the stamp of this Court's unanimous approval under the Fourteenth Amendment, is now on the books of at least six states (*supra*, pp. 10-11).

Such is the result to which appellant's arguments necessarily lead. We submit that those arguments have no basis under either the First or the Fourteenth Amendments, and that the States should be left free to handle the problem in accordance with sound reasoning and their own enlightened judgment as to local needs.

B. *Federal Legislation.*

Appellant's claims do not stop with an attack on the legislation of the many States whose public policy is similar to that of New Jersey. If appellant is correct, the Congress of the United States has over and over again violated the prohibitions of the First and Fifth Amendments by extending aid to denominational institutions or their pupils; and a whole series of Acts of Congress become of very doubtful validity.

Specific instances where the validity of such items of Federal legislation has been sustained by this Court are cited *supra* at page 39. In addition, attention may be directed, by way of illustration, to the following items of current Federal legislation:

The National School Lunch Act (Act of June 4, 1946, C. 281, 60 Stat. , 42 U. S. C. §§1751-1760) authorizes the grant of Federal funds to States to provide lunches to students of public and non-profit private schools alike. The Act provides that

> "• • • if, in any State, the State educational agency [administering the school-lunch program] is not permitted by law to disburse the funds paid to it under this Act to nonprofit private schools in the State or is not permitted by law to match Federal funds made available for use by such nonprofit private schools,"

the Federal Government

> "shall disburse the funds • • • directly to the nonprofit private schools within said State for the same purposes and subject to the same conditions • • • " (42 U. S. C. §1759)

The statute provides for furnishing the schools themselves with equipment used "in storing, preparing or serving food," as well as with food (42 U. S. C. §). Pupils in private and denominational schools are now receiving the benefits of this Act.

The Servicemen's Readjustment Act of 1944 (Act of June 22, 1944, C. 268, Title II §400 (a), 58 Stat. 287, 38 U. S. C. §701 (f) provides that every honorably discharged veteran of World War II shall be entitled to such course of education as he may elect at any approved educational institution, public or private, at which he chooses to enroll. The Federal Government pays directly to the educational institution selected by the veteran, the cost of tuition and such laboratory, library, health, infirmary and other similar fees as are customarily charged, as well as books, supplies and equipment under this Act veterans are now attending numerous private and denominational schools and colleges.

In the Act of February 25, 1931, C. 302, 46 Stat. 1419, Congress provided for reduced street-car and bus fares for "school children not over eighteen years of age, going to and from school" in the District of Columbia. When the bill originally passed the House of Representatives it provided reduced fares for only those pupils "going to and from public schools" (H. R. 12571, 71st Cong. 2nd Sess.). The Senate amended the Bill to include all schoolchildren (Sen. Report 1210, 71st Cong., 3rd Sess.; Cong. Record, Vol. 74, pp. 1078, 4488) and the bill was enacted as so amended. Subsequently, by Act of January 14, 1933, C. 10, §1, par. 19, 47 Stat. 759, Congress, in approving a unification program for the District of Columbia street-car and bus companies, provided that there should be a reduced fare "for schoolchildren not over eighteen years of age, going to and from public, parochial or like schools in the

District of Columbia." All schoolchildren of the District of Columbia, whether attending public or private schools, now ride the street cars and buses at the same reduced rate.

The foregoing Acts of Congress demonstrate that the Congress of the United States, like the Legislatures of New Jersey and of the many other States mentioned above, consider that benefits in aid of education, extended to students of public and private schools alike, constitute a use of public funds for a public purpose within the framework of the Constitution. If the New Jersey statute here in question is repugnant to the Constitution, then so, too, would be the above Acts of Congress. If the New Jersey statute violates the Constitutional prohibition against the establishment of religion, as claimed, then does not the Servicemen's Readjustment Act do likewise, since the Federal Government makes payments for tuition and other charges directly to denominational institutions? And if the New Jersey statute is unconstitutional because it is a use of public funds for a private purpose, is not the National School Lunch Act invalid for the same reason?

The samples of Federal legislation outlined above indicate the scope of governmental measures which the conscience and judgment of Congress have accepted as being fit subjects of public concern, and for which appropriations are regarded by it as serving a public purpose. There is no reason why the public policy of New Jersey, so far as the Federal Constitution is concerned, should not be regarded as equally reasonable.

With respect to Federal and State legislation alike, appellant's claims have no merit, and the public policy of New Jersey, enunciated by its Legislature, confirmed by its highest court, and concurred in by many other States, should be upheld.

CONCLUSION

It is accordingly respectfully submitted that the judgment below should be affirmed.

October 14, 1946.

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APPENDIX A

Summary of State School Bus Legislation

(Cf. Point IV of Brief *supra*, p. 52)

NOTE:—Wherever a statute has been construed either by a court decision or by an opinion of the state Attorney General, that fact is noted. In the absence of such notation, there appears to have been no construction which would bear upon the issues of the present case.

Alabama—Title 52, Sec. 76, Code of Alabama, 1940.

Provides for "transportation of pupils to and from such consolidated [i.e., public] schools."

Arizona—Sec. 54-510, Ariz. Code Ann., 1939.

School superintendent may allow not in excess of $10 per month per child for transportation of pupils "of compulsory school age, living at such a distance" that school attendance is otherwise impractical.

Arkansas—Sec. 11545, Dig. of Stats. of Ark. 1937.

School districts may provide "means for transporting pupils to and from school."

California—Sec. 16257, Education Code.

Authorizes transportation for "pupils • • • in attendance at a school other than a public school" upon the same terms and over the same route of travel as public-school pupils. Held valid in *Bowker* v. *Baker*, 167 P. (2d) 256 (1946), *supra*, page 50.

Colorado—Sec. 114, Ch. 146, 1935 Colo. Ann. Stat.

School boards may "furnish transportation to and from any school building to such pupils as shall in the opinion of the board of education * * * require such transportation."

State Attorney General has ruled that the private-school pupils may be transported on regular public-school bus routes if "no money from taxation is involved." (*Biennial Report of the Attorney General of the State of Colorado*, 1939-1940, page 157 (opinion dated Sept. 17, 1940).)

Connecticut—Sec. 237h, 1945 Supp. to Gen. Stats. of Conn.

Local authorities may "provide for the transportation of children wherever transportation is reasonable and desirable."

Delaware—Sec. 2635, Rev. Code of Del., 1935.

Provides for transportation only in the case of consolidation of public schools.

Prior statute specifically appropriating funds for transportation of children attending church schools held unconstitutional by Superior Court in *State ex rel. Traub* v. *Brown*, 36 Del. 181, 172 Atl. 835 (1934), writ of error dismissed by Supreme Court on the ground that the case had become moot, 39 Del. 187, 197 Atl. 478 (1938).

District of Columbia—Title 44, Sec. 44-214, D. C., Code, 1940.

Statute requires reduced fares, not exceeding 3¢, on all street railway and bus lines for "school children not over eighteen years of age, going to and from school". The Bill as it originally passed the House of Representatives (H. R. 12571, 71st Cong., 2nd Sess.) provided reduced fares for

public-school children only, but was amended in conference to include all school children (*supra*, p. 57).

Florida—Secs. 230.23 (10), 234.01, Florida Stats., 1941.

Provides for "transportation of pupils to the public schools."

Georgia—Sec. 32-919, Code of Georgia Annotated.

"Whenever the county board of education or local district trustees deem it for the best interest of the school, they shall have the right to provide means for the transportation of the pupils and teachers to and from said school."

Idaho—Sec. 32-618, 1940 Supp. to Idaho Code Ann. 1932.

School board may provide transportation for "resident pupils living more than one and one-half miles from the school of the district at which they are attending."

State Attorney General has ruled that this applies to public-school pupils only. (*Biennial Report of Attorney General of Idaho* 1941-1942, p. 512).

Illinois—Sec. 123.1278, Jones Illinois Stat. Ann.

Requires free transportation for "children who attend any school other than a public school" who "reside on or along the highway constituting the regular route of any public school bus or conveyance."

Indiana—28-2805, Burns Ind. Stat. Ann.

Requires free transportation of "school children who are attending any parochial school" and who "reside on or along the highway constituting the regular route of a public school bus or conveyance."

State Attorney General has ruled that local authorities are bound to transport as many parochial-school pupils as can be accommodated in the regular school bus. (*Opinions of the Attorney General of Indiana, 1936,* page 415.)

Iowa—Sec. 276.26, Code of Iowa, 1946.

"The board of every consolidated school corporation shall provide suitable transportation to and from school for every child of school age living within said corporation and more than a mile from such school".

In 1936 the State Attorney General ruled that it was constitutional to transport private-school pupils free on regular public-school bus routes. (*Report of Attorney General of Iowa, 1936,* p. 512.)

The present Attorney General ruled on February 11, 1946 (opinion unreported) that a statute which reimbursed school districts for bus expenses and which referred to "public schools" implied that transportation of public-school pupils alone was authorized. Litigation on this question is now pending in lower courts.

Kansas—72-606, 1945 Supp. to Gen. Statutes 1935.

Requires free transportation on regular public school bus routes for "pupils attending private or parochial schools of elementary and high school grades which are approved by the state board of education."

Kentucky—158.110, Revised Statutes Ann.

Authorizes boards of education to furnish transportation to any school pupils "who do not reside within reasonable walking distance of the school provided for them."

Constitutionality with respect to transportation of private school pupils sustained in *Nichols* v. *Henry*, 301 Ky. 434, 191 S. W. (2d) 930 (1945). *Cf.* earlier decision on the previous statute in *Sherrard* v. *Jefferson County Board of Education*, 294 Ky. 469, 171 S. W. (2d) 963 (1942), discussed *supra*, page 46.

Louisiana—Sec. 2248, 1946 Supp. to Gen. Stats. 1939.

Authorizes local boards to provide transportation for "children attending any school approved by the state board of education and living more than one mile from such a school of suitable grade".

Sec. 2367, General Statutes of 1939, requires that in all street railway franchises thereafter granted outside the Parish of Orleans, all school children should be given reduced rates not exceeding three-fifths of the regular fare.

State Attorney General has ruled that provision with respect to transportation of private and parochial-school pupils is constitutional (*Report and Opinions of the Attorney General of Louisiana from April 1, 1934 to April 1, 1936*, p. 241).

Louisiana statutes (Acts No. 100 and 143 of 1928) also provide for free school books for all children. Constitutionality of school book statute as applied to private school pupils sustained under State Constitution in *Borden* v. *Louisiana State Board of Education*, 168 La. 1005 (1929), and under Federal Constitution in *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370 (1930).

Maine—Sec. 8, Ch. 37 Rev. Stat., 1944.

Requires local authorities to transport "all elementary school pupils" residing in the town "a part of or the whole of the distance to and from the nearest suitable school".

State Attorney General has ruled that public funds cannot be used to transport pupils to private schools (opinion unreported).

Maryland

The Maryland Legislature has dealt with this problem by a series of local laws applicable to particular counties.

Ch. 185 of the Laws of 1937 required free transportation on regular public-school buses for "all children who attend schools in Baltimore County, which schools do not receive State aid." The constitutionality of this statute with respect to transportation of parochial-school pupils was sustained in *Board of Education* v. *Wheat*, 174 Md. 314, 199 Atl. 628 (1938).

Ch. 609 of Maryland Statutes of 1941 authorizes County Commissioners of St. Mary's County to levy and appropriate annually sufficient funds "for the transportation to and from school of children attending schools" in St. Mary's County not receiving aid from the State. Under this statute the County Commissioners made direct financial grants to parochial schools to enable them to operate their own buses. Constitutionality of statute and action of County Commissioners sustained in *Adams* v. *County Commissioners*, 180 Md. 550, 26 A. (2d) 377 (1942).

Additional statutes on the same subject are as follows:

Maryland Code, Public Local Laws, Article 16, §§997, 998, enacted by Ch. 977, Laws of 1945—applicable to "denominational or parochial non-profit schools" in Montgomery County.

Maryland Code, Public Local Laws, Article 11, §718(a) and §718(b), enacted by Ch. 422, Laws of 1941—applicable to "parochial schools" in Frederick County.

Maryland Code, Public Local Laws, Article 14, §291(a), §291(b), enacted by Ch. 648, Laws of 1943—applicable to parochial schools in Howard County "which schools do not receive state aid."

Massachusetts—Ch. 390, Acts, 1936.

Pupils attending private schools "except such schools as are operated for profit in whole or in part" are entitled to the same transportation privileges as public-school pupils.

State Attorney General has ruled that legislation is constitutional (*Report of Attorney General of Massachusetts for year ending Nov. 30, 1936*, p. 40).

Michigan—§§15.381, 15.392 and 15.457, Mich. Stat.

Authorize local authorities to furnish free transportation to private and parochial-school pupils along regular public school bus routes.

State Attorney General has ruled legislation constitutional. (Opinion dated Mar. 14, 1939, not reported.)

Minnesota—Sec. 125.06, Minn. Stats. 1945.

School boards may provide for free transportation "of pupils to and from school".

State Attorney General has ruled that owner of a school bus may transport parochial-school pupils if the district expends no funds therefor. (Opinion dated Dec. 10, 1937, not reported.) This presumably means that parochial-school pupils may travel free if the bus is not already full with public-school pupils.)

In a later opinion, the State Attorney General ruled that public school buses may not be used in transporting pupils attending parochial schools, but parochial schools may operate transportation systems and the public school

system could hire the transportation of the public school pupils therein. (Opin. Atty. Gen. (166a-7) Sept. 10, 1943.)

Mississippi—Sec. 6335, Miss. Code Ann., 1942.

Authorizes transportation of "pupils living a distance of two miles or more by the nearest traveled road from the school to which they are assigned".

Statute not officially construed; but Mississippi free textbook statute applicable to private-school pupils was sustained in *Chance* v. *Mississippi State Textbook Rating and Purchasing Board*, 190 Miss. 453, 200 So. 706 (1941).

Missouri—Sec. 10326, Mo. Rev. Stat.

Authorizes transportation of pupils attending private schools "except such schools as are operated for profit".

State Attorney General has ruled statute constitutional (Opinion dated March 21, 1946, not yet published).

Montana—Ch. 152, Sec. 8, Laws, 1941.

Any child attending "other than a public school" may receive a permit to ride on a public-school bus, provided his parents "pay their proportionate share of the cost of such transportation."

Statute not yet officially construed, but presumably payment of regular public-school taxes would amount to payment of a proportionate share of the cost of the public-school bus.

Nebraska—Secs. 79-2416 and 79-1907, Revised Stats. of Nebraska.

Authorize transportation, or cash allowance in lieu thereof, to pupils living more than a certain distance from

the public school. Apparently authorize transportation of public-school pupils only.

Nevada—Sec. 5951, Nev. Comp. Laws, 1929.

Authorizes transportation "to and from school" for all children living one mile or more therefrom.

New Hampshire—Ch. 135, Sec. 9 of Rev. Laws, 1942.

"Pupils attending approved private schools, up to and including the ninth grade" are entitled to the same transportation privileges as public-school pupils.

State Attorney General has ruled that this provision is constitutional (*Attorney General's Report, 1936-1938,* p. 33.)

New Jersey—Ch. 191, P. L., 1941.

Authorizes local authorities to provide for transportation of children to and from any school "except such school as is operated for profit in whole or in part". Where transportation is provided for public-school children, private-school children must receive transportation "from any point in such established school route to any other point in such established school route."

Constitutionality of statute upheld in *Everson* v. *Board of Education,* 133 N. J. L. 350, 44 A. (2d) 333 (1945).

New Mexico—55-1802, N. Mex. Stat. Ann., 1941.

Refers to "transportation of pupils in the public schools."

New York—Art. XI, Sec. 4, Constitution.

"The legislature may provide for the transportation of children to and from any school • • • ".

The foregoing provision was added to State Constitution in November 1938 to overcome effect of *Judd* v. *Board of Education*, 278 N. Y. 200, 15 N. E. (2d) 576 (May, 1938), holding earlier legislation unconstitutional. Under present constitutional authority, Legislature now provides equal transportation facilities to all schools, public and private (*N. Y. Education Law*, Secs. 206(18) and 503).

North Carolina—§§115-374, Gen. Stat., N. Car., 1943.

Refers to "transportation of public school children."

North Dakota—Sec. 15-3405, N. D. Rev. Code, 1943.

Provides that transportation may be furnished "each family living more than two miles from a school in the district which is taught the required length of time".

State Attorney General has ruled that private-school pupils may not be transported. (*Report of the Attorney General of North Dakota, July 1, 1942 to June 30, 1944*, p. 96.)

Ohio—Sec. 4855, Page's Ohio Gen. Code Ann.

Requires transportation to be furnished "where resident elementary school pupils live more than two miles from the school to which they are assigned".

State Attorney General has ruled that boards of education are without authority to furnish transportation for pupils attending other than the public schools. (*1927 Atty. Gen. Opns.* p. 1935.)

Oklahoma—Sec. 254, Title 70, Okla. Stat. Ann.

Requires that transportation be provided "to and from school for all pupils residing two or more miles therefrom".

Prior statute giving transportation privileges to pupils attending private or parochial schools located "along or near" public-school bus routes was held unconstitutional under State Constitution in *Gurney* v. *Ferguson*, 190 Okla. 254, 122 P. (2d) 1002 (1941), cert. den. 317 U. S. 588, rehearing denied 317 U. S. 707 (1942).

Oregon—Sec. 111-874, Comp. Laws Ann.

Wherever transportation is provided for public-school pupils, private and parochial-school pupils attending school "along or near" the public-school bus route are entitled to the same transportation.

Oregon also provides free textbooks to both public and private-school pupils (Sec. 111-2015, Oregon Comp. Laws Ann., 1943 Supplement).

The provision of both free textbooks and free transportation to private-school pupils represents a complete reversal of legislative policy in Oregon, when compared with the earlier legislation of 1922, which attempted to outlaw private schools altogether and was held unconstitutional in *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925).

Pennsylvania—Sec. 24-1425, Purden Pa. Stat. Ann.

Exempts children from compulsory school attendance laws "in case there is no public school in session within two miles by the nearest public highway" from their residence, "unless proper free transportation be furnished to such child to and from school."

Rhode Island—Section 31, Ch. 178, Gen. Laws 1938:

"The school committee of any town shall provide for pupils attending private schools of elementary and high school grades, except such schools as are oper-

ated for profit, the same rights and privileges as to transportation to and from schools as are provided for pupils attending public schools."

South Carolina—Secs. 5385(1), 5385(2), Code Laws, So. Car. 1942.

Sec. 5385(1) refers to official routes "for the transportation of pupils to and from public schools."

Sec. 5385(2) provides for payment out of public funds for transportation of pupils on such routes.

South Dakota—Sec. 15:3401, 15:3404, So. Dakota Code of 1939.

Refers to grade-school pupils who reside more than four miles from "the nearest school in the district" and to pupils in consolidated school districts who reside more than 2-1/2 miles "from the school".

It appears to be a reasonable inference from *Schiltz* v. *Picton*, 66 S. Dak. 301, 282 N. W. 519 (1938) that the statute applies to public-school pupils only, although that case (a negligence action involving an injury to a parochial-school pupil riding on a public-school bus) was based primarily on the language of the contract between the school board and the bus operator, and the court did not discuss any broader grounds of constitutional law or statutory interpretation.

Tennessee—2326, Williams Tenn. Code, 1934.

Authorizes local authorities to provide transportation for "pupils who reside too far away from the school to attend without such transportation".

Texas—Art. 2813, Vernons Tex. Civ. Stat. Ann.

Authorizes local authorities to provide "for the transporting of pupils to and from any elementary school or high school of the district".

Case now pending in lower courts involving the right of parochial-school children to ride on public-school buses.

Utah—75-7-24, Utah Code Ann., 1943.

Minimum uniform education program in each district shall include "the transportation to and from school of all pupils living more than two and one-half miles from school".

Vermont—Sec. 4269, Title 18, Pub. Laws Vt, 1933.

Authorizes transportation for each pupil "who resides at least two miles from the school he is required to attend".

Virginia—Sec. 656, Va. Code Laws, 1942.

Gives school boards authority to provide "for the consolidation of schools and for the transportation of pupils whenever such procedure will contribute to the efficiency of the school system".

Washington—Sec. 4719-1, Remington's Revised Statutes, Supplement (1945).

"All children attending school in accordance with the laws relating to compulsory attendance in the State of Washington shall be entitled to use the transportation facilities provided by the school district in which they reside."

This statute was enacted by the Washington Legislature in 1945 for the purpose of providing free transportation of private-school pupils, notwithstanding the 5 to 4 deci-

sion of the Supreme Court of Washington in *Mitchell* v. *Consolidated School District*, 17 Wash. (2d) 61, 135 P. (2d) 79 (March 1943), holding unconstitutional a prior statute giving private school pupils transportation in the regular public-school buses. The constitutionality of the present legislation is involved in a case now pending in the lower courts *Visser* v. *Nooksack School Dist.* (Superior Court for Whatcom County).

West Virginia—Sec. 13, Ch. 49, Laws, 1945.

Local authorities may provide transportation at public expense "for all children of school age who live more than two miles distant from school".

Wisconsin—Sec. 40.34, Wisc. Stat., 1945.

Local authorities may provide transportation "for all the children of school age residing in the district and enrolled in the elementary grades".

In *State ex rel Van Straten* v. *Milquet*, 180 Wisc. 109 (1923), 192 N. W. 392, the Supreme Court of Wisconsin decided that an earlier statute which required a school district, upon the suspension of its local school, "to provide transportation to and from school" in some other district did not authorize a contract for the transportation of parochial-school pupils.

In *Rutz* v. *Marek* (unreported, decided 1941), the Circuit Court of Chippewa County passed upon an earlier version of Section 40.34(2), which authorized transportation for children residing more than two miles "from the nearest school which they may attend". It held that that statute authorized transportation of private-school pupils, and as so interpreted was constitutional.

In *Costigan* v. *Hall*, 23 N. W. (2d) 495 (June 22, 1946, not yet officially reported), the Supreme Court of the State interpreted Section 40.34(2) in its present form (which speaks of "the nearest district school or federal school") as authorizing transportation of public-school pupils only. The constitutional issue was not decided (*cf.* brief *supra*, p. 41).

Constitutional amendment to authorize transportation of private-school pupils now pending (*cf.* brief *supra*, pp. 41-42).

Wyoming—Ch. 10, Session Laws, 1943.

Local authorities may provide transportation "for elementary or high school pupils within the district".